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7 and Unifund CCR Partners and  
Steven A. Booska  
8

9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA

11  
12 JASON E. DAVIS,

13 Plaintiff,

14 vs.  
15

16 UNIFUND CCR PARTNERS, a  
17 corporation; STEVEN A. BOOSKA,  
an individual; and DOES 1 through 10  
18 inclusive,

19 Defendants.  
20

) CASE NO.: 3:07-CV-01767 SI

) **NOTICE OF MOTION AND**  
) **MOTION OF DEFENDANT**  
) **STEVEN A. BOOSKA TO DISMISS**  
) **SECOND CLAIM FOR RELIEF IN**  
) **COMPLAINT; MEMORANDUM**  
) **OF POINTS AND AUTHORITIES**  
) **IN SUPPORT OF MOTION**

) Date: June 8, 2007  
) Time: 9:00 a.m.  
) Courtroom: 10 (19th Floor)

) The Honorable Susan Ilston  
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1 TO PLAINTIFF AND HIS ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on June 8, 2007, at 9:00 a.m., or as soon  
3 thereafter as the matter may be heard in Courtroom 10 of this court, located at 450  
4 Golden Gate Avenue, San Francisco, California, 94102, the Honorable Susan  
5 Ilston presiding, defendant Steven A. Booska will and hereby does move this  
6 Court for an Order, pursuant to Rule 12(b)(6) of the Federal Rules of Civil  
7 Procedure, dismissing the California state law claims asserted by Plaintiff in the  
8 Second Claims For Relief contained in the Complaint filed herein.

9 This motion is made on the grounds that the state law claims under  
10 California Civil Code § 1788 *et seq.*, (the "Rosenthal Act") fail because they are  
11 based upon alleged communications made in connection with a state court  
12 collection action. The claims are absolutely barred by the litigation privilege, as  
13 codified by the California legislature at section 47 of the California Civil Code.

14 This motion will be based upon this Notice of Motion and Motion, the  
15 accompanying Memorandum of Points and Authorities in Support of the Motion,  
16 upon all of the records on file in this action, and upon such other and further  
17 evidence or argument that the Court may permit at the hearing in this matter.

18  
19 DATED: May 1, 2007

SIMMONDS & NARITA, LLP  
TOMIO B. NARITA  
JEFFREY A. TOPOR

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23 By: s/Tomio B. Narita  
Tomio B. Narita  
Attorneys for defendants  
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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

After he stopped making payments on his Citibank credit card account, plaintiff Jason E. Davis (“Davis”), was sued in a state court collection action by Citibank’s successor in interest, defendant Unifund CCR Partners (“Unifund”). In that collection action, Unifund was represented by its counsel, defendant Steven A. Booska (“Booska”; collectively, “Defendants”). On November 16, 2006, Defendants caused the collection action to be dismissed.

On March 28, 2007, ten months after the collection action was filed against him, Davis filed this case. Davis claims that the allegations made in Defendants’ collection complaint, violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*, and the California Rosenthal Act, California Civil Code § 1788 *et seq.* (the “Rosenthal Act”).

The Rosenthal Act claims filed by Davis are barred as a matter of law. The California Supreme Court has repeatedly held that the contents of any pleading or any communications made within or in connection with litigation are absolutely privileged. Such statements cannot form the basis of any claim. Here, Davis’s state law claims are based solely upon allegedly false or misleading statements made in the collection complaint that was filed against Davis. These alleged statements are absolutely privileged, and the state law claims under the California Civil Code therefore fail as a matter of law.

Because the litigation privilege is absolute, it would be futile to grant Davis leave to amend his state law claims. Defendant Booska respectfully requests that this Court issue an Order, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissing the Second Claim for Relief as to Booska, with prejudice.

## 1 **II. ALLEGATIONS OF THE COMPLAINT**

2 On May 31, 2006, Defendants filed a collection action against Davis in the  
 3 Superior Court of California, County of Stanislaus. Davis alleges that by filing the  
 4 complaint in that action, Booska violated the Rosenthal Act when he allegedly  
 5 “falsely represent[ed] the legal status of the Debt,” “falsely represent[ed] the  
 6 amount of the Debt,” “us[ed] unfair or unconscionable means to attempt to collect  
 7 a debt in suing on a time barred debt,” “attempt[ed] to collect on an amount of  
 8 principal and interest not authorized by agreement or permitted by law,” and  
 9 “attempt[ed] to collect attorneys’ fees not authorized by agreement or permitted by  
 10 law.” See Complaint at ¶ 48. Davis further alleges that Booska violated the  
 11 Rosenthal Act by “violating 15 U.S.C §1692d”; that by filing the collection action,  
 12 Booska was engaging in conduct the natural consequence of which is harassment,  
 13 oppression or abuse of a debtor. See *id.* Davis’s entire Rosenthal Act claim arises  
 14 out of the statements allegedly made in Unifund’s collection complaint filed by  
 15 Booska in the Superior Court. *Id.* at ¶¶ 29-43.

## 16 **II. ARGUMENT**

### 17 **A. Standards Applicable To A Motion To Dismiss**

18 Where, as here, “it appears beyond doubt that the plaintiff can prove no set  
 19 of facts in support of his claim which would entitle him to relief,” the Court may  
 20 grant a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). See  
 21 *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-102, 2 L.Ed. 2d 80 (1957).  
 22 A dismissal under Rule 12(b)(6) can be based on either: 1) the lack of a cognizable  
 23 legal theory; or 2) the absence of sufficient facts alleged under a cognizable legal  
 24 theory. See *Smilecare Dental Group v. Delta Dental Plan of Cal., Inc.*, 88 F.3d  
 25 780, 783 (9th Cir. 1996); *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530,  
 26 534 (9th Cir. 1984).  
 27  
 28

1 While the Court must accept as true a plaintiff's material allegations and all  
 2 reasonable inferences therefrom, *see NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 897  
 3 (9th Cir. 1986), the Court need not accept as true conclusory allegations that are  
 4 unsupported by the facts alleged, or that are couched in factual allegation, *see*  
 5 *Holden v. Hagopian*, 978 F.2d 1115, 1121 (9th Cir. 1992); *McGlinchy v. Shell*  
 6 *Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *see also Adams v. Johnson*, 355  
 7 F.3d 1179, 1183 (9th Cir. 2004) ("conclusory allegations of law and unwarranted  
 8 inferences are insufficient to defeat a motion to dismiss").

9 **B. California's Litigation Privilege Provides An Absolute Bar To**  
 10 **Liability Based Upon Alleged Communications Made In**  
 11 **Pleadings Or In Connection With Judicial Proceedings**

12 California courts and the California legislature have long recognized that  
 13 the contents of any pleading – as well as any communications made during or in  
 14 connection with judicial proceedings – are absolutely privileged, and may not  
 15 form the basis of any subsequent claim against the speaker. "For well over a  
 16 century, communications with 'some relation' to judicial proceedings have been  
 17 absolutely immune from tort liability by the privilege codified as section 47(b)." *Rubin v. Green*, 4 Cal. 4th 1187, 1193 (1993).<sup>1</sup> The principal purpose of the  
 18 privilege is "to afford litigants and witnesses the utmost freedom of access to the  
 19 courts without fear of being harassed subsequently by derivative tort actions."  
 20 *Silberg v. Anderson*, 50 Cal. 3d 205, 213 (1990) (citations omitted). The privilege  
 21 is also designed to "encourage open channels of communication and zealous  
 22 advocacy, to promote complete and truthful testimony, and to avoid unending  
 23 litigation." *Jacob B. v. County of Shasta*, 56 Cal. Rptr. 3d 477, 483, 154 P. 3d  
 24 1003 (Cal. 2007), quoting *Rusheen v. Cohen*, 37 Cal. 4th 1048, 1063 (2006).

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 26 <sup>1</sup> Section 47(b) of the California Civil Code provides in relevant part as  
 27 follows: "A privileged publication or broadcast is one made: . . . (b) In any (1)  
 28 legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding  
 authorized by law . . . ." Cal. Civ. Code § 47(b).

1 The usual formulation of the contours of the privilege was stated by the  
2 California Supreme Court in *Silberg* as follows:

3 The privilege applies to any communication (1) made in judicial or quasi-  
4 judicial proceedings; (2) by litigants or other participants authorized by law;  
5 (3) to achieve the objects of the litigation; and (4) that have some  
6 connection or logical relation to the action.

7 *Id.* at 212.

8 The Supreme Court has made clear that the contents of all pleadings and  
9 process involved in any litigation are privileged communications and may not  
10 form the basis of any claim. *See, e.g., Rusheen v. Cohen*, 37 Cal. 4th at 1058  
11 (privilege applies to false or perjurious testimony or pleadings); *Rubin*, 4 Cal. 4th  
12 at 1195 (privilege barred claims based on contents of pleadings and amended  
13 pleadings). Indeed, the privilege extends beyond the contents of formal pleadings,  
14 and

15 applies to any publication required or permitted by law in the course of a  
16 judicial proceeding to achieve the objects of the litigation, **even though the  
17 publication is made outside the courtroom and no function of the court  
18 or its officers is involved.**

19 *Silberg*, 50 Cal. 3d at 212 (emphasis supplied).

20 The broad application of the privilege has been deemed essential to ensuring  
21 the integrity of the judicial process. *See Silberg*, 50 Cal. 3d at 214-15 (describing  
22 the privilege as “the backbone to an effective and smoothly operating judicial  
23 system”). For this reason, California courts have given the privilege an expansive  
24 reach, using it to bar both statutory and tort causes of action, with a single  
25 exception for malicious prosecution suits. *See id.* at 215-16; *see also Olszewski v.*  
26 *Scripps Health*, 30 Cal. 4th 798, 831-32 (2003) (litigation privilege barred alleged  
27 class claims asserted under Business & Professions Code § 17200); *Rubin*, 4 Cal.  
28 4th at 1200-04 (privilege barred claim for alleged violations of Business &  
Professions Code § 17200); *Ribas v. Clark*, 38 Cal. 3d 355, 364-65 (1985)  
(privilege barred claim for damages arising from alleged violations of Privacy Act,

1 Penal Code §§ 630, *et seq.*); *Carden v. Getzoff*, 190 Cal. App. 3d 907, 909 n. 2  
 2 (1987) (privilege barred claim for fraud and deceit); *Steiner v. Eikerling*, 181 Cal.  
 3 App. 3d 639, 642-43 (1986) (privilege barred claim based on publication of forged  
 4 will prepared for probate); *Portman v. George McDonald Law Corp.*, 99 Cal. App.  
 5 3d 988, 989-90 (1979) (privilege barred claim for negligent misrepresentation).  
 6 Indeed, the California Supreme Court recently held that the privilege barred a  
 7 claim based upon the constitutional right to privacy. *See Jacob B.*, 56 Cal. Rptr.  
 8 3d at 488 (“The same compelling need to afford free access to the courts exists  
 9 whatever label is given to a privacy cause of action.”).

10 Federal courts in California have repeatedly applied the privilege to bar  
 11 state law claims – including Rosenthal Act claims – arising out of communications  
 12 occurring within collection actions. *See, e.g. Sengchanthalangsy v. Accelerated*  
 13 *Recovery Specialists, Inc.*, 473 F. Supp. 2d 1083 (privilege barred claims for fraud,  
 14 negligence and violations of Cal. Bus. & Prof. Code § 17200 based upon allegedly  
 15 false affidavit used in connection with collection action); *Taylor v. Quall*, 458 F.  
 16 Supp. 2d 1065, 1067-68 (C.D. Cal. 2006) (privilege barred Rosenthal Act claim  
 17 and § 17200 claim based upon allegedly false statements made in connection with  
 18 collection litigation).<sup>2</sup>

19  
 20 <sup>2</sup> Even if Davis sought leave to amend based upon prelitigation  
 21 communications, his claim would still fail. In addition to pleadings and process  
 22 involved in the litigation, the litigation privilege also “has been broadly construed to  
 23 apply to demand letters and prelitigation communications by an attorney.” *Knoell v.*  
 24 *Petrovich*, 76 Cal. App. 4th 164, 171 (1999) (privilege barred claim based on  
 25 statements made in attorney’s demand letter); *see also Rubin*, 4 Cal. 4th at 1194-95  
 26 (statements in attorneys’ pre-litigation notice of intent to sue were protected by the  
 27 privilege); *Home Ins. Co. v. Zurich Ins. Co.*, 96 Cal. App. 4th 17, 24 (2002) (privilege  
 28 barred claims based upon statements made by counsel during settlement  
 negotiations); *Larmour v. Campanale*, 96 Cal. App. 3d 566, 569 (1979) (attorney’s  
 demand letter held privileged); *Lerette v. Dean Witter Org., Inc.*, 60 Cal. App. 3d 573,  
 577-78 (1976) (“Therefore, we hold that a demand letter such as that sent by Dubow

**C. The Second Claim For Relief Is Based Upon Alleged Statements Made In A Complaint In Connection With The State Court Collection Action And Therefore Fail As A Matter Of Law**

The only conduct complained of in the Complaint is the filing of and the statements made within the state court collection action. All of the allegations made to support Davis's claims under the Rosenthal Act are based upon statements made in that collection complaint. The state law claims are therefore based solely upon communications made within or in connection with the collection action. Davis's Second Claims for Relief falls squarely within the bar of the litigation privilege. The claims fail.

Davis alleges that the collection complaint falsely represented the debt's legal status, falsely represented the amount of the debt, improperly sought to recover on a time-barred debt, attempted to collect on an amount of principal and interest not authorized by agreement or permitted by law, and attempted to collect attorneys' fees not authorized by agreement or permitted by law. *See* Complaint at ¶¶ 36, 39-40, 41, 48. By challenging these allegations – which are contained in the collection complaint itself – Davis's state law claims run headlong into the absolute bar of the litigation privilege. *See, e.g., Rusheen*, 37 Cal. 4th at 1062, 39 Cal. Rptr. 3d at 722 (abuse of process claims based upon filing of allegedly perjured proofs of service barred by privilege); *Olszewski*, 30 Cal. 4th at 831-32, 135 Cal. Rptr. 2d at 28 (section 17200 claim based upon the filing of liens barred by the privilege); *Albertson v. Raboff*, 46 Cal. 2d 375, 380-81 (1956) (slander of title claim based on recording notice of lis pendens barred by privilege).

**IV. CONCLUSION**

The Rosenthal Act claims asserted by Davis are based exclusively upon statements that were allegedly made in a collection complaint filed in the Superior Court of California, County of Stanislaus. All communications made in

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is fully privileged under section 47 as preliminary to a judicial proceeding.”).

1 connection with that litigation are absolutely privileged and cannot form the basis  
2 of any claim against Booska. The privilege is absolute, and therefore any attempt  
3 to amend the claims would be futile.

4 Accordingly, defendant Booska respectfully requests that this Court enter an  
5 Order dismissing the Second Claim for Relief, with prejudice.

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7 DATED: May 1, 2007

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